

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRED A. HUNT)	
Claimant)	
VS.)	
)	Docket No. 189,862
FRITO-LAY)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appeals from the Order entered by Administrative Law Judge Bryce D. Benedict dated November 19, 1997. The Appeals Board heard oral argument May 27, 1998.

APPEARANCES

Brian J. Fowler of Kansas City, Missouri, appeared for the respondent. Larry G. Karns of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund. There was no appearance for the claimant.

ISSUES

In its Application for Review By Workers' Compensation Appeals Board, respondent raised the issue of whether respondent is due reimbursement from the Kansas Workers Compensation Fund for its alleged overpayment to claimant of permanent partial disability compensation.

At oral argument to the Board, respondent also attempted to raise an issue concerning the Fund's stipulated 50 percent contribution. That issue was not before the Administrative Law Judge and, therefore, it is not before the Board as a part of this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant injured his left knee on March 25, 1994, when he slipped and fell from an elevated board while washing his truck windows. He also developed low back problems which began approximately three to four months after this accident. A claim was made against respondent and the Kansas Workers Compensation Fund was apparently impleaded, under K.S.A. 44-567, although a copy of that pleading does not appear in the file. A stipulation was filed October 2, 1995, whereby the Fund agreed to contribute 50 percent for all medical, temporary total disability, and permanent partial disability paid for this claim.

On November 16, 1995, an Award was issued by Assistant Director David A. Shufelt. Claimant was awarded a 65 percent permanent partial general body work disability. Claimant's functional impairment was found to be 24 percent of the body as a whole of which half, or approximately 15 percent, was found to be pre-existing. Accordingly, claimant was awarded 12 weeks of temporary total disability at the rate of \$313 per week, or \$3,756, followed by 269.75 weeks at \$313 per week, or \$84,431.75, for a total award of \$88,187.75.

Following the entry of the Award by Assistant Director Shufelt, respondent learned that claimant had obtained new employment and that he was earning more than 90 percent of his pre-injury wages. Respondent filed for a review and modification and a hearing was held on October 10, 1996, before Administrative Law Judge Bryce D. Benedict. An order modifying the original Award was entered the next day. In this modified award, the Administrative Law Judge found that claimant, as of October 1, 1995, was employed as an over-the-road trucker earning wages equal to 90 percent or more of the gross weekly wage that he was earning at the time of the injury. As a result, the Administrative Law Judge found that claimant was not entitled to an award based upon work disability but instead only to his 15 percent functional disability. At the time of Judge Benedict's award on review and modification, respondent had already paid the full amount of this modified award, pursuant to Assistant Director Shufelt's original Award. Respondent alleges it has overpaid claimant in the amount of \$18,075.75 for which respondent seeks reimbursement from the Fund in this action. (\$41,316 paid less \$23,240.25 owed pursuant to Judge Benedict's award equals alleged overpayment of \$18,075.75.) The Administrative Law Judge determined there was no basis in the Workers Compensation Act to order the Fund to make this reimbursement to respondent. The Appeals Board agrees.

K.S.A. 44-534a(b) and K.S.A. 44-556(d) provide the exclusive remedies for an employer to seek reimbursement from the Fund for excess payment of compensation. Kimber v. U.S.D. No. 418, 24 Kan. App. 2d 280, 944 P.2d 169 (1997). However, neither statute would authorize reimbursement from the Fund for overpayment in this instance.

K.S.A. 44-534a(b) allows for reimbursement from the Fund when compensation is paid in the form of medical benefits or temporary total disability benefits pursuant to the preliminary hearing statute. This statute does not apply to the case at hand because

respondent seeks reimbursement for permanent partial disability benefits paid pursuant to a "final" award, not a preliminary hearing order.

K.S.A. 44-556(d)(1) allows for reimbursement from the Fund for overpayments made while an award is pending judicial review and then the compensation awarded by the Appeals Board is reduced or found inappropriate. The situation in this case does not fit within that statute either because the Board did not enter an award that was later reduced by an appellate court. "Review" as used in K.S.A. 44-556(d)(1) refers to judicial review of actions by the Board by an appeal to the Court of Appeals. It does not refer to review under the review and modification statute, K.S.A. 44-528.

Therefore, since neither statute authorizes reimbursement from the Fund in the situation at hand, the Board does not have authority under either statute to order reimbursement to respondent from the Fund. There is no provision in the Act that provides for reimbursement in this situation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated November 19, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian J. Fowler, Kansas City, MO
 Larry G. Karns, Topeka, KS
 George H. Pearson, Topeka, KS
 Bryce D. Benedict, Administrative Law Judge
 Philip S. Harness, Director